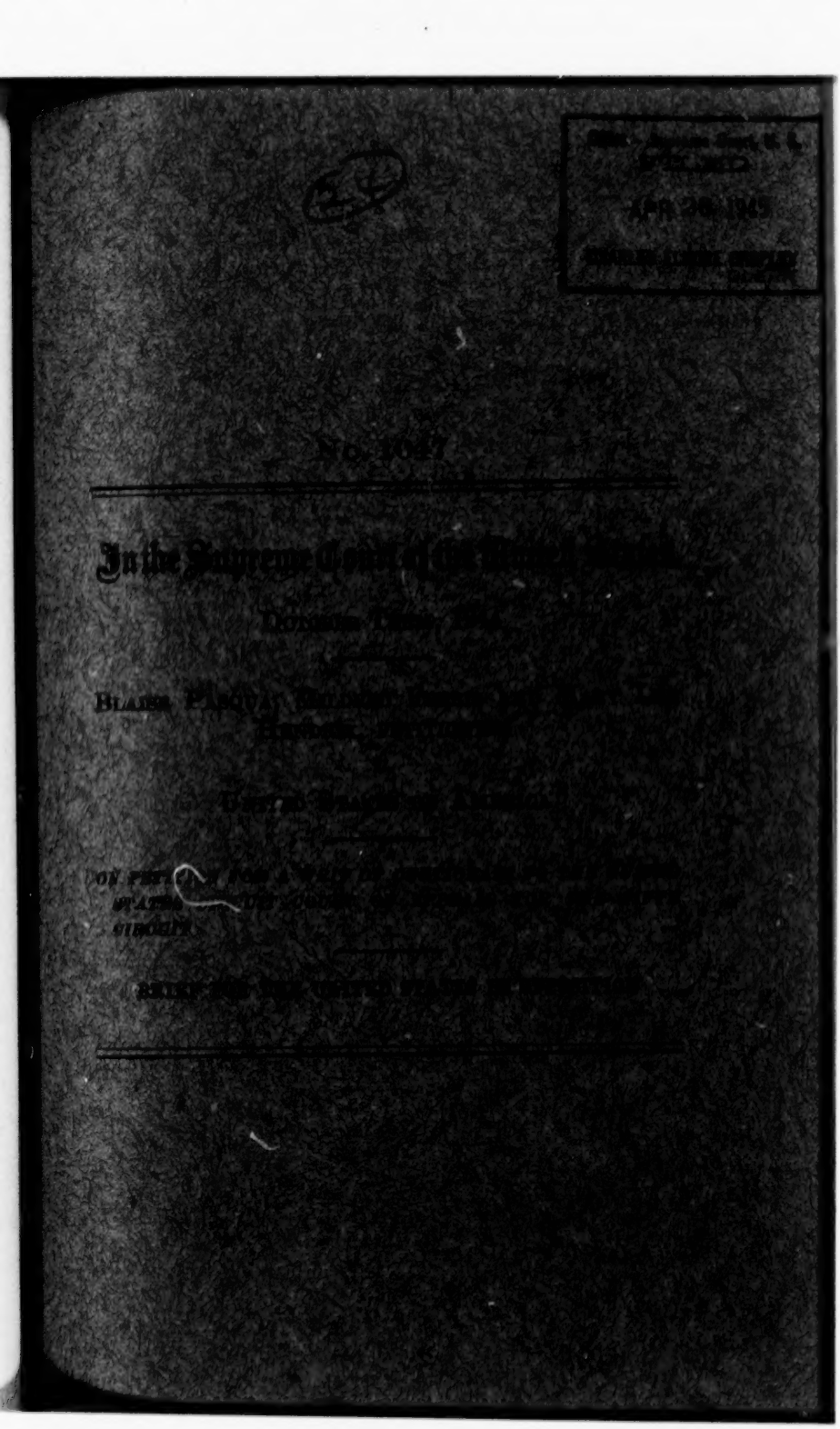

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1047

BLAISE PASQUA, MILDRED FERRIS AND MARY LEE HENDRIX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 380–382) is reported at 146 F. 2d 522.

JURISDICTION

The judgment of the circuit court of appeals was entered January 3, 1945 (R. 382), and a petition for rehearing was denied February 20, 1945 (R. 394). The petition for a writ of certiorari was filed March 17, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for a violation of the Mann Act, it was proper to permit the Government to introduce evidence of the character of the place to which the women named in the indictment were transported.

2. Whether the conduct of the trial judge was such as to deprive petitioners of their right to a fair and impartial trial.

3. Whether the trial judge's charge on the presumption of innocence, to which petitioners reserved no exception, was so clearly erroneous that the circuit court of appeals abused its discretion in declining to notice such unassigned error and to reverse the conviction on such ground.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825, 18 U. S. C. 398, known as the Mann Act, provides in part:

> That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauch-

> ery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

Petitioners were indicted in the United States District Court for the Eastern District of Louisiana in two counts, each charging violation of the Mann Act by the transportation of a different group of girls on different occasions from Georgia to Louisiana for the purpose of prostitution and debauchery and with intent to induce, entice and compel the girls to practice prostitution and to give themselves up to debauchery (R. 2–3). Petitioners were found guilty on both counts (R. 12). Petitioner Pasqua was sentenced to five years' imprisonment on each count, the sentences to run consecutively (R. 19–20), and the two other petitioners were sentenced to five years on the first count and three years on the second count, the sentences to run consecutively (R. 21–23). On appeal the judgments of conviction were affirmed (R. 382).

The evidence for the Government may be summarized as follows:

Petitioner Pasqua owned and operated a roadhouse tavern known as the Highway Club near Thibodeaux, Louisiana (R. 44, 45, 88, 204). The establishment contained a bar at which liquor was sold and a dimly lighted dance floor (R. 153, 224, 242, 281). The girls employed by Pasqua lived in rooms adjacent to the dance floor (R. 50–51). They received no salary (R. 135–136, 289) but were paid a commission on each drink which they induced customers to order for themselves and for the girls (R. 49–50, 119, 249, 289). In order to encourage the men to buy drinks, the girls would engage in lewd and lascivious dancing with the customers (R. 122, 150–151, 153–154, 279) and would permit the customers to take indecent liberties with them (R. 279, 326). Pasqua would point out to the girls the customers who had money (R. 74, 75, 260). Almost all of the girls who worked for Pasqua engaged in prostitution (R. 75, 78, 129).

Petitioners Ferris and Hendrix were employed in Pasqua's establishment. In May 1941, these two women returned to their home in the vicinity of Ellijay, Georgia. There they induced the three girls named in the second count of the indictment to return with them to work at the Highway Club. (R. 246–248, 286–288, 291.) A few days after the arrival of these girls at Pasqua's place, the local

sheriff informed Pasqua that two of the girls were too young to work in such an establishment (R. 160, 264, 294). The third girl remained and subsequently practiced prostitution because she found her income from commissions on drinks insufficient (R. 257–258, 264–265). She had not been a prostitute prior to the time she was brought to Louisiana by petitioners (R. 258).

Pasqua hired a local taxi owner to return the other two girls to their home in Georgia (R. 159, 162). Petitioners Ferris and Hendrix accompanied the two girls to their home in Georgia (R. 35, 107, 160) and there renewed their efforts to recruit girls to work for Pasqua (R. 37, 40, 112–113, 214–215). They brought back with them the three girls named in the first count of the indictment (R. 43–44, 116–117, 162, 216). Two of these girls were aged 15 and 17, respectively (R. 34, 117), and had not theretofore engaged in sexual intercourse (R. 80, 144). All three petitioners urged these two girls to engage in prostitution (R. 54–56, 58, 74, 78, 122, 125–126, 140–143). Pasqua told them that if they would "fill dates" they would make more money and have pretty clothes (R. 54, 55–58, 126) and he told one of them that she was "no good to him" if she did not "fill dates" (R. 57, 69, 71). Pasqua himself tried to induce the fifteen-year old girl to have illicit relations with him (R. 126). When one of the girls "filled a date" Pasqua would take away part of

the tokens representing her commissions on drinks as his "cut on the date" (R. 73).

ARGUMENT

Petitioners assert (Pet. 4, 5, 6, 13) that the trial judge improperly allowed the Government to introduce into evidence proof of the bad character of petitioner's place and thus to impugn the character of all the petitioners, despite the fact that they did not take the stand in their own behalf. Petitioners are apparently objecting to the fact that government witnesses were allowed to testify to the character of the dancing in Pasqua's club and to the fact that the girls there employed regularly engaged in prostitution (see *supra*, p. 4). Such testimony was, however, clearly relevant as tending to prove that petitioners knowingly transported each of the girls to a place which would tend to "induce her to give herself up to a condition of debauchery which eventually, necessarily and naturally would lead to a course of immorality sexually." *Athanasaw* v. *United States*, 227 U. S. 326, 331; see *Pine* v. *United States*, 135 F. 2d 353, 356 (C. C. A. 5), certiorari denied, 320 U. S. 740; *United States* v. *Lewis*, 110 F. 2d 460, 464 (C. C. A. 7), certiorari denied, 310 U. S. 634. From the reference to their petition for rehearing in the court below (Pet. 13; see R. 389) it appears that petitioners particularly complain of two remarks by the judge during the testimony of a witness who worked at a club adjacent to the

Highway Club. When she testified that Pasqua tried to induce her to work for him selling drinks, petitioners' counsel objected on the ground that such testimony would place the character of petitioner in issue, and the judge stated that it was "unfortunate that the character of the defendant was so intimately associated with the character of the place" (R. 206). She also testified that Pasqua told her that the two other petitioners were making money by "hustling" and, when defense counsel objected to such testimony, the judge stated that there was "sufficient evidence already before the jury, from which the jury, at this time, might draw a conclusion adverse to the character" of these two petitioners (R. 207–208).[1] The judge's first remark was a correct statement of the law. As to the second, while it might have been better to have avoided a reference to petitioners' character as distinct from the nature of the place in which they worked, the remark could scarcely have been prejudicial in view of the testimony already before the jury that these two petitioners had themselves urged the girls whom they transported to engage in prostitution (R. 78, 141).

2. Petitioners contend (Pet. 4, 5, 7–8, 12–13) that the trial judge deprived them of a fair trial

[1] On objection by defense counsel the prosecuting attorney had withdrawn a specific question addressed to a previous witness as to whether the two female petitioners engaged in prostitution and the court admonished the jury not to draw any inference from the prosecutor's question (R. 76–77).

by questioning various witnesses from time to time. The circuit court of appeals disapproved of the practice but held that the judge's conduct did not constitute prejudicial error (R. 381–382). We think that the circuit court of appeals may have been unduly critical of the trial judge. Almost all the witnesses for the Government displayed an obvious reluctance to testify (see R. 51–53, 124–125, 207, 220, 230, 253, 320) and, in many instances, the court's interrogation was designed to impress the witnesses with the fact that they were under oath and were expected to tell the truth (R. 47, 59, 67, 91–92, 110–111, 125, 144–145, 183, 220, 223, 307).[2] The other questioning by the trial judge was largely an effort to have the witnesses explain apparent inconsistencies in their testimony (R. 56, 87, 98–100, 101–102, 184–185, 235–237, 243–244, 250–252, 301–302, 306–307). The record as a whole, we think, shows that the trial judge did no more than exercise the well-established right of federal judges to interrogate

[2] Petitioners object (Pet. 4, 5) to the fact that a number of government witnesses were allowed to refresh their recollections from documents identified by the witnesses as signed statements which they had given to investigating officers. It is well established, however, that it is within the discretion of the trial judge to permit such statements to be used in the manner that the prosecution here used them. *Hyde* v. *United States*, 225 U. S. 347, 377–378; *United States* v. *Graham*, 102 F. 2d 436, 441 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Pernatto* v. *United States*, 104 F. 2d 427, 428 (C. C. A. 3); *United States* v. *Petrie*, 59 F. 2d 1005, 1006 (C. C. A. 2).

witnesses in an impartial manner in the interest of eliciting a full disclosure of material facts. *United States* v. *Gross,* 103 F. 2d 11, 13 (C. C. A. 7); *United States* v. *Breen,* 96 F. 2d 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States,* 25 F. 2d 258, 259 (C. C. A. 8); *Kettenbach* v. *United States,* 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613. Clearly, there was no such impropriety as would warrant reversal of petitioners' convictions on such ground. *Glasser* v. *United States,* 315 U. S. 60, 83.

3. The judge charged the jury on the presumption of innocence as follows (R. 338–339):

> * * * The defendants are not called upon to prove themselves innocent of the charges laid against them in the indictment; they may rely upon the presumption of innocence that attends them at all times until and unless, in the course of the trial, they are proved guilty, beyond a reasonable doubt. Now, the rule of "the presumption of innocence" imposes upon the government, therefore, the burden of establishing the guilt of each defendant, beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who in fact is guilty, so that he or she may escape just punishment. The rule is but a

humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this "presumption of innocence," when, once having retired to deliberate upon your verdict, you review, weigh and consider the whole body of the evidence. As I have stated, the burden rests upon the government, remember, to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. But this "presumption of innocence" will avail the defendants no further, so soon as there is made out prima facie evidence, of the truth of the charges laid against him or her in the indictment. That prima facie evidence bars the presumption of innocence, because the "presumption" is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established. If such prima facie evidence, which so brushes aside the presumption of innocence, when found worthy of belief by the jury, is not met by the defendants' own opposing satisfactory evidence, then that simple prima facie evidence, if it convinces you gentlemen, as the exclusive judges of the facts, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilt as charged. You are the sole and exclusive judges of the evi-

> dence, and of the credibility of the witnesses who have testified before you in this case.

Counsel took no exception to this portion of the judge's charge (cf. R. 347–349) and the circuit court of appeals held that "while that charge contains errors, the guilt of the defendants is so overwhelmingly shown by the record that we think the administration of justice does not require us to take notice of such errors" (R. 382).

There is no merit in petitioners' contention (Pet. 6–7, 10–12) that the circuit court of appeals abused its discretion in declining to notice such unassigned error and to reverse the conviction on such ground. The trial judge may have used inept language[3] but the general tenor of his charge on the presumption of innocence was not objectionable. He did instruct the jury that petitioners entered the trial with a presumption of innocence in their favor, that the jury must give "serious consideration" to the presumption and that the burden rested on the Government to overcome the presumption and establish guilt beyond a reasonable doubt. Although he spoke of

[3] In a prior decision, *Gomila* v. *United States*, 146 F. 2d 372, the Circuit Court of Appeals for the Fifth Circuit had reversed a conviction in a case which it considered doubtful on the evidence because of an accumulation of errors, including a charge similar to the one here given by the trial judge that the presumption of innocence was not intended to protect a person who was in fact guilty so that he might escape just punishment.

overcoming the presumption by prima facie evidence, he explained that the prima facie evidence must be sufficient to convince the jury beyond a reasonable doubt (R. 339). In essence the charge is not very different from that approved by this Court in *Allen* v. *United States*, 164 U. S. 492, 500, a capital case.[4] See also *Boehm* v. *United States*, 123 F. 2d 791, 811 (C. C. A. 8), certiorari denied, 315 U. S. 800. Moreover, subsequent to the portion of his charge quoted above, the trial judge several times again adverted to the necessity that the Government prove its case beyond a reasonable doubt and fully and correctly defined "reasonable doubt" (R. 341, 342, 343, 344, 345, 348–349). Petitioners' counsel obviously thought the charge fair to his clients for, although he reserved numerous exceptions during the trial, he did not except to the portion thereof of which he now complains. The circuit court of appeals, therefore, properly held that petitioners' objection to

[4] The charge in the *Allen* case was as follows:

"* * * a party starts into a trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor. That stays with him until it is driven out of the case by the testimony. It is driven out of the case when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed, or, that a crime has been committed. Whenever the proof shows, beyond a reasonable doubt, the existence of a crime, then the presumption of innocence disappears from the case. That exists up to the time that it is driven out in that way by proof to that extent."

the judge's charge, raised for the first time on appeal, presented no ground for reversal. *Johnston* v. *United States*, 318 U. S. 189, 201; *Holmgren* v. *United States*, 217 U. S. 509, 523–524; *Allis* v. *United States*, 155 U. S. 117, 122; *United States* v. *Manton*, 107 F. 2d 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664.

CONCLUSION

The decision below is correct. It presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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